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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

GLOBEFILL INCORPORATED,

Plaintiff,

v.

ELEMENTS SPIRITS, INC. and KIM  
BRANDI,

Defendants.

Case No. 10-CV-2034 CBM (PLAx)

**DEFENDANT ELEMENTS  
SPIRITS, INC.'S MOTION IN  
LIMINE # 4 TO EXCLUDE THE  
REPORTS AND TESTIMONY OF  
BRUCE ISAACSON**

[Filed concurrently with Declaration of  
Shaunt T. Arevian in Support of  
Elements' MILs #1-5 and [Proposed]  
Order]

Date: October 29, 2013

Time: 2:30 PM

Place: Courtroom 2

**TO THE COURT, THE PARTIES, AND THEIR ATTORNEYS OF  
RECORD:**

**PLEASE TAKE NOTICE** that October 29, 2013 at 2:30 p.m., or as soon thereafter as counsel may be heard by the above-entitled Court, Defendant Elements Spirits, Inc. will and hereby does move in limine to exclude evidence and testimony from Plaintiff Globefill, Inc.'s survey expert, Bruce Isaacson. This motion is made following the conference of counsel under Local Rule 7-3 on Friday, September 20, 2013.

This motion is based on the Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Shaunt T. Arevian in support of Elements' MILs #1-5, all pleadings and submissions on file in this action, and upon such other matters as may be presented to the Court at or before the time of the hearing.

DATED: October 1, 2013      MEYLAN DAVITT JAIN & AREVIAN LLP  
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By: /s/ Steven M. Weinberg  
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Attorneys for Defendant  
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## TABLE OF CONTENTS

|  | Page |
|--|------|
| TABLE OF AUTHORITIES.....  | ii   |
| I. INTRODUCTION.....   | 1    |
| II. ARGUMENT .....   | 2    |
| A. The Court Should Preclude Dr. Isaacson From Offering Evidence<br>Or Testimony On Topics Outside His Expertise Or Which Are<br>Speculative.....                                | 2    |
| B. Dr. Isaacson’s “Squirt” Survey Is Unreliable And Should Be<br>Excluded.....   | 8    |
| 1. Dr. Isaacson’s Undisclosed Eveready Survey Is The Proper<br>Survey Methodology For Globefill’s Trade Dress.....   | 9    |
| 2. Dr. Isaacson’s Lineup Survey Is Methodologically Unsound<br>Because It Was Not Conducted According To Accepted<br>Principles, And Therefore Unreliable And Inadmissible. .... | 12   |
| a. The Lineup Survey Did Not Replicate Marketplace<br>Conditions Because It Did Not Display KAH Tequila<br>As It Is Sold At The Point Of Sale.....                               | 12   |
| b. The Lineup Survey Did Not Employ A Control<br>Designed According To Accepted Principles. ....   | 14   |
| c. The Lineup Survey Is Nothing More Than A<br>Matching Game That Created Demand Effects As A<br>Result Of Its Overly Suggestive Nature.....                                     | 16   |
| d. The Lineup Survey Did Not Poll The Relevant<br>Universe And Is Therefore Unreliable.....  | 18   |
| C. Even if the Court Does Not Exclude the Isaacson Lineup Survey,<br>Its Application is Limited .....  | 19   |
| III. CONCLUSION .....  | 20   |

**TABLE OF AUTHORITIES**

Page(s)

**CASES**

|  |        |
|--|--------|
| AMF Inc. v. Sleekcraft Boats,<br>599 F.2d 341 (9th Cir. 1979) .....                                    | 19     |
| Avila v. Willits Env'tl Remed'tn Trust,<br>633 F.3d 828 (9th Cir. 2011) .....                          | 3      |
| California ex rel. Brown v. Safeway, Inc.,<br>615 F.3d 1171 (9th Cir. 2010) .....                      | 6      |
| Daubert v. Merrell Dow Pharmaceuticals,<br>509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993) ..... | 2, 8   |
| E & J Gallo Winery v. Proximo Spirits, Inc.,<br>2011 WL 5922090 (E.D. Cal. Nov. 28, 2011) .....        | 11     |
| Earp v. Cnty. of Tulare,<br>2012 WL 1076217 (E.D. Cal. Mar. 29, 2012) .....                            | 3      |
| Hokto Kinoko Co. v. Concord Farms, Inc.,<br>810 F. Supp. 2d 1013 (C.D. Cal. 2011) .....                | 10     |
| Kumho Tire Co., Ltd. v. Carmichael,<br>526 U.S. 137, 119 S. Ct. 1167, 143 L.Ed.2d 238 (1999) .....     | 2      |
| Lust v. Merrell Dow Pharmaceuticals, Inc.,<br>89 F.3d 594 (9th Cir.1996) .....                         | 3      |
| Pecover v. Elec. Arts Inc.,<br>2010 WL 8742757 (N.D. Cal. Decl. 21, 2010) .....                        | 3      |
| Reinsdorf v. Skechers U.S.A.,<br>2013 WL 454828 (C.D. Cal. Feb. 6, 2013) .....                         | 8, 18  |
| Simon Property Group L.P. v. mySimon, Inc.,<br>104 F. Supp. 2d 1033 (S.D. Ind. 2000) .....             | passim |
| Storie v. Duckett Truck Center, Inc.,<br>2007 WL 4454297 (E.D. Mo. Dec. 14, 2007) .....                | 3      |

**TABLE OF AUTHORITIES, cont'd.**

|  | Page(s)      |
|--|--------------|
| Sunbeam Corp. v. Equity Industries Corp.,<br>635 F. Supp. 625 (E.D. Va. 1986).....                     | 8, 17        |
| THOIP v. Walt Disney Co.,<br>690 F. Supp. 2d 218 (S.D.N.Y. 2010).....                                  | 8, 13, 18    |
| THOIP v. Walt Disney Co.,<br>788 F. Supp. 2d 168 (S.D.N.Y. 2011).....                                  | 18           |
| Tokidoki, LLC v. Fortune Dynamic, Inc.,<br>2009 WL 2366439 (C.D. Cal. July 28, 2009) .....             | 8, 13-14, 18 |
| Trouble v. Wet Seal, Inc.,<br>179 F.Supp.2d 291 (S.D.N.Y.2001).....                                    | 5            |
| Tyco Thermal Controls LLC v. Redwood Industrials,<br>2010 U.S. Dist. LEXIS 47019 (N.D. Cal. 2010)..... | 2            |
| United States v. Finley,<br>301 F.3d 1000 (9th Cir.2002).....  | 2            |
| Walnut Creek Manor, LLC v. Mayhew Ctr., LLC,<br>622 F. Supp. 2d 918 (N.D. Cal. 2009) .....             | 2            |
| Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.,<br>254 F.3d 706 (8th Cir.2001).....  | 3            |
| White v. Ford Motor Co.,<br>312 F.3d 998 (9th Cir. 2002).....  | 3            |

**STATUTES**

**FEDERAL RULES OF EVIDENCE**

|               |               |
|---------------|---------------|
| Rule 401..... | 4             |
| Rule 402..... | 4             |
| Rule 702..... | <i>passim</i> |

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Elements Spirits Inc. (“Elements”) respectfully submits that the testimony,  
4 surveys, and reports prepared by Plaintiff Globefill Inc.’s (“Plaintiff” or  
5 “Globefill”) survey expert, Dr. Bruce Isaacson, should be excluded for several  
6 reasons.

7 First, Dr. Isaacson improperly attempts to offer expert testimony on topics  
8 for which he lacks sufficient expertise. Specifically, Dr. Isaacson, who has  
9 admitted in deposition that he is neither an expert on beverage alcohol marketing  
10 nor consumer purchasing behavior as it relates to the consideration and purchase  
11 of alcoholic beverages, dedicates much of his testimony on the Sleekcraft factor  
12 issue of whether tequila and vodka are proximate, competitive and commercially  
13 related. His testimony, which is based on little more than visits to liquor stores  
14 and various articles he found on the Internet, is lay testimony, and not based on  
15 “scientific, technical, or other specialized knowledge” as required by FRE 702.

16 Second, Dr. Isaacson’s conclusions regarding how consumers will  
17 purchase or consider purchasing premium tequila and premium vodka, and how  
18 these products will be merchandised in the marketplace and similar issues are  
19 entirely speculative.

20 Third, Dr. Isaacson’s two “Squirt” surveys are irreparably flawed and must  
21 be excluded for many reasons, including that the use of the Squirt methodology  
22 was improper, the specific lineup methodology employed was nothing more than  
23 a guessing game creating an improper demand effect, the control used was  
24 improper, and it tested an improper universe.

25 Fourth, even if some weight is to be given to the survey, by Dr. Isaacson’s  
26 own admission, his survey is limited to a very specific situation – where a  
27 consumer who knows of Crystal Head Vodka or encounters it for the first time in  
28

1 a liquor store immediately goes to the tequila aisle and encounters only KAH  
2 Blanco. It thus does not apply where a consumer encounters KAH Blanco and  
3 one or more of the other three KAH tequila products either off-premise (for  
4 example, in liquor stores) or in any on-premise environment (places like  
5 restaurants and bars where spirits are consumed).

## 6 II. ARGUMENT

### 7 A. The Court Should Preclude Dr. Isaacson From Offering Evidence Or 8 Testimony On Topics Outside His Expertise Or Which Are 9 Speculative.

10 The test for admissibility of expert testimony under Daubert v. Merrell Dow  
11 Pharmaceuticals, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993), and  
12 Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L.Ed.2d  
13 238 (1999), is whether the opinion the expert seeks to offer is “relevant and  
14 reliable.” Walnut Creek Manor, LLC v. Mayhew Ctr., LLC, 622 F. Supp. 2d 918,  
15 926 (N.D. Cal. 2009). “This determination ‘entails a preliminary assessment of  
16 whether the reasoning or methodology underlying the testimony is scientifically  
17 valid and of whether that reasoning or methodology properly can be applied to the  
18 facts in issue.’” Id., citing Daubert, 509 U.S. at 592, 113 S.Ct. 2786. See also Tyco  
19 Thermal Controls LLC v. Redwood Industrials, 2010 U.S. Dist. LEXIS 47019  
20 (N.D. Cal. 2010). Here, Dr. Isaacson’s testimony and conclusions regarding the  
21 relationship of vodka and tequila, how they are sold and marketed, and consumer  
22 purchasing behavior related thereto fail to meet this standard.

23 It is black letter law that for an expert to offer testimony on a particular  
24 topic, he or she “must have sufficient expertise” in that topic. See, e.g., United  
25 States v. Finley, 301 F.3d 1000, 1007 (9th Cir.2002) (“[Rule 702] consists of three  
26 distinct but related requirements: (1) the subject matter at issue must be beyond the  
27 common knowledge of the average layman; (2) the witness must have sufficient  
28



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1 expertise; and (3) the state of the pertinent art or scientific knowledge permits the  
2 assertion of a reasonable opinion”); Avila v. Willits Env’tl Remed’tn Trust, 633  
3 F.3d 828, 839 (9th Cir. 2011) (upholding exclusion of expert’s testimony on effect  
4 of burning solvents in the chrome-plating process because expert, although holding  
5 degrees in chemistry, did not specialize in metal working industry); White v. Ford  
6 Motor Co., 312 F.3d 998, 1008-1009 (9th Cir. 2002) (“A layman, which is what an  
7 expert witness is when testifying outside his area of expertise, ought not to be  
8 anointed with ersatz authority as a court-approved expert witness for what is  
9 essentially a lay opinion.”); see also Wheeling Pittsburgh Steel Corp. v. Beelman  
10 River Terminals, Inc., 254 F.3d 706, 715 (8th Cir.2001) . Further, it is the offering  
11 party’s burden to establish that its expert possesses sufficient expertise to testify on  
12 a particular topic. See Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594, 598  
13 (9th Cir.1996).

14 Following this well settled precedent, numerous courts have precluded  
15 experts from offering evidence or testimony beyond their expertise. See, e.g.,  
16 Pecover v. Elec. Arts Inc., 2010 WL 8742757, \*5-7 (N.D. Cal. Decl. 21, 2010)  
17 (excluding video game executive from offering opinions on (1) video game  
18 consumer motivation analysis; (2) cost/revenue analysis; (3) statistical analysis; and  
19 (4) data evaluation and interpretation because all were outside the expert’s  
20 expertise); Earp v. Cnty. of Tulare, 2012 WL 1076217, \*4 (E.D. Cal. Mar. 29,  
21 2012) (excluding nurse’s testimony on the cause of plaintiff’s injuries because such  
22 causation testimony was outside the nurse’s expertise); Storie v. Duckett Truck  
23 Center, Inc., 2007 WL 4454297, \*8 (E.D. Mo. Dec. 14, 2007) (excluding testimony  
24 on value of used cars by expert who owned body and mechanic shop for 16 years  
25 on grounds testimony was outside the expert’s expertise).

26 Dr. Isaacson opines throughout his Rebuttal Report (“Initial Reply and  
27 Additional Survey Submitted by Dr. Bruce Isaacson in Response to the Reports of  
28



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1 Hal Poret, John Kennard, and Philip Johnson, Dkt. No. 170 (the “Isaacson Rebuttal  
2 Rpt.”) on issues as to which he admits having no expertise. (Declaration of Shaunt  
3 T. Arevian in Support of Elements’ MILs #1-5 (“Arevian Decl.”), Ex. G.) These  
4 opinions do not satisfy the qualification requirements of Federal Rule of Evidence  
5 702, are irrelevant under Rule 401, and inadmissible under Rule 402.

6 Specifically, Dr. Isaacson admits that he is not an expert in the alcoholic  
7 beverage industry or in the marketing or sale of spirits (Arevian Decl., Ex.H at  
8 46:20-23), or consumer behavior as it applies to the purchase of beverages alcohol  
9 (Id. at 46:24-47:5).

10 Notwithstanding these admissions of non-expertise and no relevant  
11 experience beyond that of a lay person, Dr. Isaacson’s Rebuttal Report is replete  
12 with alleged opinions on the proximity, competitiveness and relatedness of vodka  
13 and tequila, and how consumers purchase them, topics that are outside of his area of  
14 expertise and experience and which, as shown below, are subject to exclusion.

15 Dr. Isaacson addresses these issues under the “framework” of what he refers  
16 to as the “Four P’s.” (Arevian Decl., Ex.G at ¶¶17-50.) His use of the Four P’s  
17 here, and his “analysis” of the product similarity Sleekcraft factor under that rubric,  
18 however, are not based on his expertise or any professional experience but instead  
19 on his excludable lay personal observations and conclusions. For example, under  
20 the First and Second P’s (“place” and “product”) his attempt to show that vodka and  
21 tequila are sold in the same kinds of stores and as products that are similar and  
22 related are primarily based on his observations walking through a few liquor stores  
23 and (incomplete) quotes and (mis)interpretations of newspaper articles<sup>1</sup> and

24 <sup>1</sup> For example, Dr. Isaacson quotes from an article in *The New York Times*, which  
25 he suggests shows that tequila and vodka are substitutable, one of Plaintiff’s  
26 themes regarding similarity. However, what the article actually shows is that  
27 different kinds of spirits, and not just vodka and tequila, can be used for a variety  
28 of cocktails that share some other ingredients and have different names. (Arevian  
Decl., Ex. G at ¶24 n. 3.) Similarly, the *Los Angeles Times* article to which he  
refers does not equate vodka and tequila but instead shows how spirits like

(continued...)

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incorrect speculation.<sup>2</sup> He also tries to prove this relationship through some third party data – but completely fails to provide any evidence that tequila and vodka are any more or less related than are any spirits or other alcoholic beverages (including wine or beer).<sup>3</sup> What he in any event and significantly fails to provide is any evidence that people who purchase a premium vodka would purchase a premium tequila. And even if he tried to introduce such evidence, because he is not an expert in these areas, areas which a jury is equally qualified to assess, his testimony must be excluded. See Malletier v. Dooney & Bourke, Inc., 525 F.Supp.2d 558, 570 (S.D.N.Y.2007); Trouble v. Wet Seal, Inc., 179 F.Supp.2d 291, 303 (S.D.N.Y.2001) (on matters where a jury can make a determination on its own, expert testimony should be excluded);

Dr. Isaacson's testimony regarding the third "P," "Price," is entirely based on lay observations – a liquor store website. And his conclusion, that "it is reasonable to expect that a consumer willing to buy a product in the super premium category for one type of spirit, may also consider other spirits in that category"

*(...continued)*

tequila are making headway in the spirits world, following the lead of vodka and scotch. (*Id.*)

<sup>2</sup> By way of one example, Dr. Isaacson surmises that "the variety of Kah that is likely best-selling is Blanco; Crystal Head and Blanco are both completely clear in color." (Arevian Decl., Ex. G at ¶23.) First, Dr. Isaacson's surmise is wrong – the evidence in this case is that KAH Reposado is the best-selling variety. Second, the color of these spirits is beside the point – all of the KAH bottles are opaque so that the color of any of them is not seen at the point of purchase or in marketing materials.

<sup>3</sup> Indeed, the Kennard Report to which Dr. Isaacson refers in his Rebuttal Report, Arevian Decl., Ex. G at ¶32) shows that there is no particular relationship between vodka and tequila than with any other spirit, and that vodka and tequila are neither competitive nor substitutable. (See Preliminary Expert Report by John V. O. Kennard In Opposition to Plaintiff's Motions for Summary Judgment and Preliminary Injunction (hereinafter, the "Kennard Rpt") at 9-17, Dkt No. 165-6.) Mr. Kennard, in sharp contrast to Dr. Isaacson, has been a senior executive in the beverage alcohol industry for 30 years, and has had senior level responsibility for a number of major spirits brands.

1 (Arevian Decl., Ex. G at ¶38) is not based on any expertise in alcoholic beverage  
2 consuming behavior or beverage alcohol marketing (he admits having none);  
3 instead, it is pure speculation, and thus excludable for that reason as well.  
4 California ex rel. Brown v. Safeway, Inc., 615 F.3d 1171, 1181 fn. 4 (9th Cir. 2010)  
5 (“An expert's opinions that are without factual basis and are based on speculation or  
6 conjecture are inadmissible at trial ....”). Dr. Isaacson’s testimony regarding the  
7 fourth “P,” “Promotion,” suffers from the same disability. His observations are  
8 based not on any expertise, but on his interpretation of what he viewed on lay  
9 websites (for example, Amazon.com and BevMo.com). (Arevian Decl., Ex. G at  
10 ¶¶39-50.)

11 Other examples of Dr. Isaacson’s non-expert and speculative testimony  
12 include the following:

13 (a) “My understanding is that goods are proximate if  
14 they are “similar in use and function” and “would be  
15 reasonably thought by the buying public to come from  
16 the same source if sold under the same mark.” I believe  
17 that vodka and tequila would be considered proximate by  
18 this definition, and must be considered competitive if  
19 considered through market analysis.” (Arevian Decl.,  
20 Ex. G at ¶18.)

21 (b) “KAH and Crystal Head are relatively new  
22 brands; as they grow, they will be increasingly found in  
23 the same retailers.” (Arevian Decl., Ex. G at ¶21.)

24 (c) “Although I did not visit on-premise locations,  
25 such as bars, clubs or restaurants, in my store checks, it is  
26 reasonable to expect that tequila and vodka might be  
27 merchandised together.” (Arevian Decl., Ex. G at ¶22.)  
28

1 Element's Objections to each of these filed in connection with Plaintiff's  
2 Motion for Summary Judgment were sustained by the Court in its Tentative  
3 Rulings. (Arevian Decl. Ex. L.)

4 Dr. Isaacson engaged in other speculative and non-expert conclusions that  
5 should be excluded, including the following:

6 (a) "If nearly two-thirds of tequila drinkers also drink  
7 vodka, it is highly likely that some shopping trips will  
8 involve purchases of both vodka and tequila. It is also  
9 highly likely that tequila drinkers will attend to stimuli  
10 that involve vodka, because for nearly two-thirds of  
11 tequila drinkers, vodka is a relevant beverage."

12 (Arevian Decl., Ex. G at ¶33.)

13 This is speculative and incomplete – the issue is not whether people may or  
14 may not purchase vodka and tequila on the same trip but whether or not people who  
15 buy premium vodka are also likely to purchase premium tequila. These are issues  
16 involving consumer purchasing behavior of alcoholic beverages as to which Dr.  
17 Isaacson has admitted having no expertise.

18 (b) "It is reasonable to expect that a consumer willing  
19 to buy a product in the super premium category for one  
20 type of spirit, may also consider other spirits in that price  
21 category." (Arevian Decl., Ex. G at A ¶38.)

22 Here again, there is no "scientific, technical, or other  
23 specialized knowledge" supporting this conjecture and for that reason  
24 it should be excluded.

25 In other words, Dr. Isaacson's testimony on the issue of the proximity,  
26 relatedness and competitiveness of premium tequila and premium vodka and what  
27 consumers may do or be willing to do when it comes to purchasing premium spirits,

1 is not based on “the expert’s scientific, technical, or other specialized knowledge”  
2 required by Federal Rule of Evidence 702 because he has admitted that he has none  
3 in the beverage alcohol industry or consumer behavior in the purchase of such  
4 products.

5 **B. Dr. Isaacson’s “Squirt” Survey Is Unreliable And Should Be**  
6 **Excluded.**

7 Survey evidence is reliable and admissible where it is conducted according to  
8 accepted principles of survey design. See Daubert v. Merrell Dow Pharms., Inc.,  
9 509 U.S. 579, 589 & n. 7, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993) (explaining the  
10 trial judge’s prerogative to “ensure that any and all scientific testimony or evidence  
11 admitted is not only relevant, but reliable”); see also FRE 702; Reinsdorf v.  
12 Skechers U.S.A., 2013 WL 454828, \*10 (C.D. Cal. Feb. 6, 2013) (excluding survey  
13 which did not comport to accepted principles).

14 Although minor technical flaws in a survey typically go to weight,  
15 fundamental methodological irregularities bearing on reliability, on the other hand,  
16 require exclusion of the survey evidence. See, e.g., Reinsdorf, 2013 WL 454828  
17 at\*10 (improper survey universe, coupled with other faults, rendered survey  
18 inadmissible); see also Tokidoki, LLC v. Fortune Dynamic, Inc., 2009 WL  
19 2366439, \*14 (C.D. Cal. July 28, 2009) (finding Dr. Isaacson’s survey inadmissible  
20 to show a likelihood of confusion because of methodological flaws); THOIP v.  
21 Walt Disney Co., 690 F. Supp. 2d 218, 231 (S.D.N.Y 2010) (excluding comparative  
22 array survey which did not reflect actual marketplace conditions); Sunbeam Corp.  
23 v. Equity Industries Corp., 635 F. Supp. 625, 635 (E.D. Va. 1986) (rejecting overly  
24 suggestive array survey); Simon Property Group L.P. v. mySimon, Inc., 104 F.  
25 Supp. 2d 1033, 1052 (S.D. Ind. 2000) (excluding survey that employed improper  
26 controls against guessing).

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1 Dr. Isaacson's comparative array survey methodology (the "Lineup Survey")  
2 is so riddled with material defects that it is totally unreliable and must be excluded.  
3 Among the myriad methodological flaws – which include the failure to replicate  
4 marketplace conditions, the use of improper controls against guessing, the creation  
5 of demand effects in a matching game, and an improper universe – one stands  
6 above all: Dr. Isaacson's decision to employ a comparative array methodology  
7 (also called a "Squirt" survey) instead of the gold-standard Eveready survey. This  
8 decision speaks volumes as it was made only after an undisclosed Eveready survey  
9 he ran showed no confusion.

10 **1. Dr. Isaacson's Undisclosed Eveready Survey Is The Proper**  
11 **Survey Methodology For Globefill's Trade Dress.**

12 Although his Rebuttal Report was devoid of all mention of it, Dr. Isaacson  
13 conducted an Eveready survey concurrently with his Lineup Survey. (Arevian  
14 Decl., Ex.M.) The Eveready survey purportedly was cancelled because it showed  
15 no confusion. (Arevian Decl., Ex. H (Eveready survey showed "little confusion")  
16 and 97:16-21 (regarding decision to cancel Eveready survey); Ex. I at 33 [Expert  
17 Report of Hal Poret, dated May 2013, Dkt No. 165-3 ("Poret Rpt.")], ("Dr.  
18 Isaacson's Eveready Survey showed 0% confusion").) After deciding not to  
19 continue with the Eveready, Dr. Isaacson invented an "awareness" survey  
20 specifically designed to show that the Crystal Head trade dress was not well enough  
21 known for an Eveready. As shown below, the Eveready format was the proper  
22 methodology for this case – indeed, it has been used before by Dr. Isaacson in  
23 analogous cases to this – and the trumped up "awareness" survey was nothing more  
24 than afterthought subterfuge for Plaintiff's reliance on the improper Lineup  
25 methodology.<sup>4</sup>

26 <sup>4</sup> Curiously, Dr. Isaacson stopped the Eveready survey two weeks before he  
27 started the Awareness study. (Arevian Decl., Ex. M.)



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1 The Eveready model is the “gold standard” for strong marks. See Swann,  
2 Jerre B., “Likelihood of Confusion Studies and the Straightened Scope of Squirt,”  
3 98 The Trademark Reporter, 739 (May-June 2008), (attached as Arevian Decl., Ex.  
4 I, cited in the Isaacson Expert Report (Dkt. No. 131-3) (hereinafter “Isaacson  
5 Rpt.”), ¶30, n. 5). Plaintiff has argued before this Court that its Crystal Head trade  
6 dress is a strong mark, and successfully so, in that the Court preliminarily has found  
7 the trade dress to be a strong mark. (Order Denying Plaintiff’s Motion for a  
8 Preliminary Injunction, Dkt. 126 at 9 (“The Court finds that the skull-shaped bottle  
9 is conceptually and commercially strong...”)).

10 “A mark is ‘strong’ if it is memorable and if the public would likely associate  
11 it with the mark’s owner.” Hokto Kinoko Co. v. Concord Farms, Inc., 810 F. Supp.  
12 2d 1013, 1029-30 (C.D. Cal. 2011) (applying Sleekcraft strength of mark factor in  
13 likelihood of confusion analysis) (citing Brookfield Comm., Inc. v. West Coast  
14 Entm’t Corp., 174 F.3d 1036, 1058 (9th Cir.1999)). Globefill alleges exactly this  
15 type of strength throughout its Second Amended Complaint, Dkt No. 53 (“SAC”).  
16 For example, Globefill alleges that there has been sufficient exposure of its alleged  
17 trade dress to the public that the trade dress serves as a source identifier. (See SAC,  
18 ¶14). Globefill also alleges that its trade dress is strong as a source identifier also  
19 because: (a) the trade dress is “widely publicized in association with the famous  
20 actor and entertainer, Dan Aykroyd, who has been the centerpiece of [promotion]”  
21 (SAC, ¶17); (b) there was extensive media coverage including radio and television  
22 interviews with Mr. Aykroyd concerning the trade dress (SAC, ¶19); (c) Globefill’s  
23 product is sold in 47 states (SAC, ¶21); (d) Mr. Aykroyd conducted 45 promotional  
24 signings where 750-1500 people attended (Id.); (e) Globefill’s website received  
25 535,000 visits in one month (SAC, ¶22); and, (e) Mr. Aykroyd appeared as a  
26 keynote speaker at an industry trade show (SAC, ¶23).



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Courts – and Dr. Isaacson himself – have considered precisely such allegations to justify use of the Eveready format. For example, in E & J Gallo Winery v. Proximo Spirits, Inc., 2011 WL 5922090 (E.D. Cal. Nov. 28, 2011), the court considered the very same question – whether the Eveready survey format, or a lineup survey format was appropriate. Id. at \*4. The court found that the Eveready format was proper to determine likelihood of confusion with the counter-claimant’s trade dress, in part, because of counter-claimant’s strength *allegations* that: (a) substantial sums had been expended on promotion and advertising to create source identification; and, (b) the counter-claimant’s trade dress had secondary meaning. Id. at \*6-7. Globefill’s allegations are even more specific than those in Gallo.

Also telling is that Dr. Isaacson recently relied on the same strength allegations to justify application of the Eveready survey format to test likelihood of confusion. In Akiro LLC v. House of Cheatham, Inc., case number 12-CV-5775 (JSR), currently pending in the United States District Court for the Southern District of New York (“Akiro”), Dr. Isaacson employed an Eveready survey based on allegations in the plaintiff’s complaint that: (1) its mark was famous and inherently distinctive; (2) its mark had earned good-will; (3) the mark was advertised and promoted at trade shows with “audio spots” and public relations, and; (4) the mark was promoted in magazines and on television. (Arevian Decl., Ex. K at ¶¶23-24.) Globefill alleges the same type of notoriety for its trade dress with one exception – here, a world-famous film actor advertises Crystal Head Vodka at trade shows, does public relations, and promotes the mark on network television.

Under both Dr. Isaacson’s reasons for using an Eveready in Akiro, and court decisions as in Gallo, *supra*, Eveready is the appropriate survey here.<sup>5</sup> Plaintiff’s

<sup>5</sup> The Isaacson Eveready survey results are consistent with those in Elements’ expert’s Eveready survey – no confusion. (See Phillip Johnson Rebuttal of the Isaacson Survey, Dkt No. 165-4 (hereinafter “Johnson Survey”).)

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1 attempt to hide behind the Awareness study, which as earlier noted was not run  
2 until it became clear that the Eveready study was not showing confusion, is in any  
3 event of no comfort -- the results of the Awareness survey show there is sufficient  
4 brand awareness for use of the Eveready format.

5 The Eveready format is appropriate where the senior mark is in the minds of  
6 consumers. (Arevian Decl., Ex. J at ¶6.) The results of Dr. Isaacson's Awareness  
7 survey show that Globefill's trade dress is in the minds of a substantial percentage  
8 of the relevant consuming public -- 46%. This number alone is enough to warrant  
9 use of the Eveready format. (Arevian Decl., Ex. I at 30-34). Coupling this 46%  
10 awareness of Globefill's trade dress with Globefill's allegations and judicial  
11 admissions of strength, the Eveready, and not the Lineup survey, was the proper  
12 methodology here.

13 Accordingly, the Lineup Survey was not the proper survey methodology  
14 according to accepted principles and should be excluded by this Court.

15 **2. Dr. Isaacson's Lineup Survey Is Methodologically Unsound**  
16 **Because It Was Not Conducted According To Accepted**  
17 **Principles, And Therefore Unreliable And Inadmissible.**

18 Aside from employing the wrong survey format generally (which alone  
19 requires exclusion), Dr. Isaacson's Lineup Survey is unreliable because it does not  
20 comport to generally accepted survey principles on marketplace conditions, controls  
21 against guessing, eliminating the demand effect bias, and universe. These defects  
22 are fatal.

23 **a. The Lineup Survey Did Not Replicate Marketplace**  
24 **Conditions Because It Did Not Display KAH Tequila As It**  
25 **Is Sold At The Point Of Sale.**

26 The cornerstone of a survey's reliability is its ability to simulate the "actual  
27 marketplace conditions in which consumers encounter the parties' products so as to  
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1 be a reliable indicator of consumer confusion.” THOIP, supra, 690 F. Supp. 2d at  
2 232 (where the court excluded survey evidence which did not replicate marketplace  
3 conditions for sale of actual products tested); see also Tokidoki, supra, 2009 WL  
4 2366439 at \*9 (finding fault in Dr. Isaacson’s survey where accused product was  
5 not shown as displayed in the marketplace). The Lineup Survey does not replicate  
6 actual marketplace conditions and is therefore unreliable in at least three respects.

7 First, the marketplace is such – and the pictures attached to the Isaacson  
8 Report show – that KAH is virtually always displayed in liquor stores with its four  
9 varieties (Blanco, Reposado, Anejo and Extra Anejo), in some combination, as a  
10 single, colorful, unit in the marketplace and at the point of sale. (Arevian Decl., Ex.  
11 J at Page ID Nos. 2508-2523; Ex. I at 16.) “This variety of colorful looks could  
12 certainly be a factor that would prevent a consumer from making a connection to  
13 the clear Crystal Head bottle.” (Arevian Decl., Ex. I at 17.) Dr. Isaacson, however,  
14 displayed KAH Blanco alone among the other tequilas in his survey. (Arevian  
15 Decl., Ex. J at ¶¶60-61.) By failing to replicate these marketplace conditions, Dr.  
16 Isaacson biased the survey by “depriving respondents of significant marketplace  
17 context that is highly relevant to perception of the product and its source.” (Arevian  
18 Decl., Ex. I at 17.)

19 Second, the Lineup Survey failed to replicate the marketplace conditions in  
20 which consumers encounter Crystal Head vodka and KAH tequila. Under the  
21 Lineup survey, a consumer is shown the Crystal Head bottle, and then shown three  
22 tequila bottles, one of which is the KAH Blanco bottle. This is not even close to any  
23 version of the marketplace. As shown in the “Isaacson Report”, tequila and vodka  
24 products are not shelved together, and consumers shopping in liquor stores are not  
25 just exposed to vodka and tequila, but are exposed to many other spirit types.  
26 (Arevian Decl., Ex. J at Page ID Nos. 2517 & 2523 (showing vast nature of spirits  
27 sections of retail stores); Ex. I at 15 (“[a]s Dr. Isaacson’s own photos show, it is  
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1 extremely likely that a consumer shopping trip that involves exposure to Crystal  
2 Head and KAH will also involve exposure to a large variety of other vodka  
3 products and other types of alcohol”).) Dr. Isaacson’s survey, however, is premised  
4 on the mistaken and unreliable assumption that a consumer will see Globefill’s  
5 Crystal Head vodka (in isolation at that), and then immediately be exposed to  
6 Elements’ KAH Blanco tequila, a scenario that has no counterpart in the real world.  
7 (Arevian Decl., Ex. I at 8; 10-15.)<sup>6</sup>

8 Dr. Isaacson’s failure to replicate marketplace conditions as to how KAH is  
9 displayed, how consumers actually encounter premium vodka and premium tequila,  
10 and which tequilas are sold side-by-side with KAH renders his Lineup Survey  
11 unreliable.

12 **b. The Lineup Survey Did Not Employ A Control Designed**  
13 **According To Accepted Principles.**

14 The Lineup Survey is unreliable also because it employed inadequate  
15 controls to filter out guessing, also known as survey noise. “A control should be as  
16 close to the allegedly infringing design as possible without itself being infringing,  
17 so that one can accurately gauge the noise level – the people who are prone to  
18 guessing or yea-saying.” Tokidoki, supra, 2009 WL 2366439 at \*8 (where the  
19 court, in excluding Dr. Isaacson’s survey criticized the control because it was so  
20 different from the accused design that it could not pick up all of the survey noise)  
21 Id. Likewise, the court in Simon, supra, found a control (which made no mention of  
22 the name “Simon”) was so different from the accused products (the “mySimon”  
23 mark, the web address [www.mysimon.com](http://www.mysimon.com), and a character named “Simon”) that it

24  
25 <sup>6</sup> Dr. Isaacson admitted that his Lineup survey does not test for confusion in any  
26 circumstance other than a consumer who knows of or first encounters Crystal  
27 Head vodka in a liquor store and then immediately encounters KAH Blanco, and  
only KAH Blanco. See discussion infra. (Arevian Decl., Ex. H at 179:17-  
181:22.)

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1 did not test for legal confusion – and excluded the survey for that independent  
2 reason. Simon, supra, 104 F. Supp. 2d at 1048.

3 Dr. Isaacson’s Lineup Survey controls are inadequate and do not conform to  
4 accepted principles because neither control shares the defining characteristic of the  
5 KAH bottle – its Calaveras/skull motif. (Arevian Decl., Ex. J at Ex. 3 (picture of  
6 Control 1 at Page ID No. 2526, and picture of Control 2 at Page ID No. 2527); Ex. I  
7 at 6-13 (detailing the problems with Dr. Isaacson’s controls and the result of such  
8 problems on the Lineup Survey).) Utilizing a control with a skull theme would  
9 eliminate the bias present in surveys that “consumers are prone to make  
10 associations between products based solely on the concept of a skull, even if the  
11 overall trade dress is not at all similar.” (Arevian Decl., Ex. I at 9.) Dr. Isaacson’s  
12 results are of no value without a control that retained some concept of a skull to test  
13 the tendency of the survey to cause respondents to make such superficial  
14 connections in the absence of trade dress similarity. (Id. at 18-19.)

15 The need for a proper control containing skull conceptual elements is  
16 necessary here because unlike in the usual trade dress case where the trade dress  
17 cannot be referred to with a common name, but usually is a combination of graphic  
18 features having no name, here the shape of the Plaintiff’s bottle can be identified as  
19 a “skull.” The shape of a skull is a common one in the human experience, and is  
20 easily identifiable by this single word. Thus, a proper control would have to weed  
21 out the people who were choosing the KAH Blanco bottle because it too could be  
22 identified as a kind of skull rather than because they deemed it confusingly similar  
23 to the Crystal Head trade dress. A control that has no skull elements fails to test  
24 whether the alleged confusion is attributable to the concept of a skull or to real  
25  
26  
27  
28

1 confusion. Because Dr. Isaacson's control has no skull-like elements or features, it  
2 failed its purpose.<sup>7</sup>

3 Dr. Isaacson's failure to employ controls that at all reference skull imagery  
4 does not conform to accepted principles of survey design, and the Lineup Survey is  
5 therefore unreliable.

6 **c. The Lineup Survey Is Nothing More Than A Matching**  
7 **Game That Created Demand Effects As A Result Of Its**  
8 **Overly Suggestive Nature.**

9 Dr. Isaacson's Lineup Survey design is methodologically unsound and  
10 unreliable for the additional reason that it is a mere matching game – where  
11 respondents did nothing more than match skull to skull. The conspicuously  
12 suggestive array of spirits shown to respondents produced a “demand effect” which  
13 biased the results by suggesting the “correct” answer was the only skull in the  
14 lineup. See Simon, supra, 104 F. Supp. 2d at 1048 (explaining the demand effect  
15 generally).

16 Dr. Isaacson's Lineup Survey first exposed respondents to Crystal Head  
17 vodka, and then exposed respondents to a lineup of four other spirits including  
18 KAH Blanco. (Arevian Decl., Ex. G ¶¶60-61.) The lineup of four spirits was  
19 highly leading as the KAH bottle was the only one that shared a skull motif with

20  
21 <sup>7</sup> In his Rebuttal Report, Dr. Isaacson states that in his rebuttal survey - which  
22 suffers from the same improper lineup format and other infirmities as the initial  
23 survey -- he used a new control, a Jose Cuervo bottle with certain skull elements.  
24 He claims that he used this bottle because it was identified in the Poret Report as  
25 a control that could have been used, and that Elements' counsel had stated during  
26 deposition that this bottle would be a good control. (Arevian Decl., Ex. G at 27.)  
27 Quite contrary to Dr. Isaacson's implication, however, Mr. Poret never stated that  
28 this Jose Cuervo bottle would be a proper control – the bottles he suggested as  
controls are shown on page 20 of his Report and do not include the Jose Cuervo  
bottle. Further, Element's counsel is not a survey expert, so his opinion as to  
what would or would not be a good control is quite beside the point, and certainly  
not a basis for Dr. Isaacson's having chosen as a control a bottle not identified by  
a real expert, Mr. Poret, as a proper control.



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1 Crystal Head. Thus, respondents who had just been exposed to a skull and then  
2 immediately are shown a lineup with only one skull-shaped product naturally would  
3 easily be led to guess that the “right” answer was the only skull shaped product in  
4 the lineup. Dr. Isaacson’s survey thus created an impermissible matching game  
5 designed in a manner that respondents naturally, in trying to be right, matched a  
6 skull to a skull. This was made even easier than in most trade dress cases since a  
7 common name could be attached to both product configurations – a skull. It’s no  
8 wonder, then, that exposure to the KAH bottle resulted in the high levels of  
9 purported gross confusion of between 56.2% and 58.7%, respectively, the stated  
10 reason for “confusion” was the skull shape. (Arevian Decl., Ex. G at ¶¶78-79, 81,  
11 Table 3.)

12 A faulty lineup served as the basis for exclusion of a similarly suggestive  
13 survey in Sunbeam, *supra*, 635 F. Supp. at 634. The Sunbeam court rejected the  
14 survey results as unreliable to establish likelihood of confusion, because the  
15 accused product in the survey stood out like “a bearded man in a lineup with four  
16 clean-shaven men.” *Id.* at 635. The court further observed that “[w]hen a survey  
17 question begs its answer it is not a true indicator of the likelihood of consumer  
18 confusion.” *Id.*

19 Similarly, in Simon Property Group L.P. v. mySimon, Inc., *supra*, the district  
20 court rejected highly suggestive surveys where the accused product was the only  
21 product in the displayed array that at all related to the “Simon” characteristic of  
22 plaintiff’s mark. Simon, 104 F. Supp. 2d at 1051 (footnote omitted). The court  
23 found the survey to be “highly suggestive and leading” because the “correct”  
24 answer was perfectly obvious. *Id.* The court went on to note that such survey  
25 formats “test nothing more than the memory and common sense of a respondent  
26 which show nothing probative or relevant about possible consumer confusion.” *Id.*



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1 Likewise, the court in THOIP v. Disney, supra, excluded plaintiff's  
2 likelihood of confusion survey because the accused product displayed in the  
3 comparative array was clearly more similar to the plaintiff's product than any other  
4 shirt in the array. THOIP, supra, 690 F. Supp. 2d at 237. In a later proceeding, the  
5 court described the plaintiff's survey as "slanted" and that it "test[ed] nothing more  
6 than the memory and common sense of a respondent." See THOIP v. Walt Disney  
7 Co., 788 F. Supp. 2d 168, 183 (S.D.N.Y. 2011) (footnote and internal citations  
8 omitted).

9 The same principle that demanded exclusion in Sunbeam, Simon, and THOIP  
10 applies here. Dr. Isaacson's Lineup Survey is highly leading, biased, and nothing  
11 more than a matching game where respondents were asked to match skull to skull.  
12 It does not comport with sound methodology and is blatantly improper. See J.  
13 Thomas McCarthy, TRADEMARKS AND UNFAIR COMPETITION, § 32:170,  
14 32-383 (4th ed. 2013) (hereinafter "McCarthy") ("[a] professional survey expert  
15 will use standard procedures to ensure that the survey was administered in such a  
16 manner as to minimize error and bias.") (footnote omitted). The Lineup Survey is  
17 also unreliable for this reason.

18 **d. The Lineup Survey Did Not Poll The Relevant Universe**  
19 **And Is Therefore Unreliable.**

20 Dr. Isaacson's Lineup Survey also is unreliable and inadmissible because the  
21 universe is not properly defined. See Tokidoki, supra, 2009 WL 2366439 at \*9  
22 (finding Dr. Isaacson's survey was unreliable as a measure of confusion because it  
23 excluded a significant portion of the relevant universe of respondents.) See also  
24 Reinsdorf, supra, 2013 WL 454828 at \*10 (finding demographically flawed survey  
25 polled an irrelevant universe and was unreliable).

26 An improper and over-inclusive universe that includes persons whose  
27 perceptions are not relevant skews a survey's results, making it unreliable. See  
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1 McCarthy, § 32:161, 32-348 (4th ed. 2013) (explaining effect of irrelevant survey  
2 respondents). Here, the Lineup Survey results are skewed and unreliable because  
3 they include the perceptions of irrelevant consumers. (Arevian Decl., Ex. I at 29-30  
4 (specifically outlining defects in the Lineup Survey's universe, and the effect on  
5 survey results).) "[W]hen the goods are expensive, the buyer can be expected to  
6 exercise greater care in his purchases." AMF Inc. v. Sleekcraft Boats, 599 F.2d  
7 341, 353 (9th Cir. 1979). The perception of consumers that are willing to purchase  
8 a \$30.00 bottle of tequila, but not a \$40.00 bottle of tequila (i.e. a product that is  
9 33% more expensive) are irrelevant and skew the survey results because the over-  
10 included consumer's lack of attention may have led to confusion. Dr. Isaacson's  
11 Lineup Survey is unreliable for this additional reason.

12 **C. Even if the Court Does Not Exclude the Isaacson Lineup Survey, Its**  
13 **Application is Limited**

14 As Dr. Isaacson admits, his Lineup survey does not test for confusion in any  
15 circumstance other than when a consumer who knows of or first encounters Crystal  
16 Head vodka in a liquor store then immediately encounters KAH Blanco, and only  
17 KAH Blanco. (Arevian Decl., Ex. H at 179:17-181:22.) Accordingly, it does not  
18 apply to any of the following situations:

- 19 • Any on-premise environment, such as a bar or restaurant;
- 20 • Any off-premise environment, like a liquor store, where a consumer
- 21 encounters alcoholic beverages other than tequila immediately after
- 22 encountering a bottle of Crystal Head vodka;
- 23 • Any off-premise environment where a customer with an awareness of
- 24 Crystal Head vodka prior to entry encounters any alcoholic beverages
- 25 other than tequila immediately after entering the store; and
- 26 • Any off-premise environment where a consumer encounters more than
- 27 one type of KAH tequila displayed together.

1 In other words, the only situations in which Dr. Isaacson's lineup survey  
2 could be used as a measure of confusion are in the following two artificial and  
3 highly unlikely scenarios: (1) in which a consumer without knowledge of Crystal  
4 Head vodka walks into a liquor store, sees a bottle of Crystal Head vodka, and then  
5 immediately encounters (without looking at any other spirits or other alcoholic  
6 beverages), a bottle of KAH Blanco (and no other types of KAH tequila), or (2) in  
7 which a consumer with an awareness of Crystal Head vodka walks into a liquor  
8 store and immediately encounters a bottle of KAH Blanco (and no other types of  
9 KAH tequila). There is of course no evidence in this case that either scenario has  
10 occurred or will occur.

11 **III. CONCLUSION**

12 For all of the foregoing reasons, Elements respectfully requests that the  
13 Court, as the gatekeeper for expert testimony, exclude Dr. Isaacson's testimony and  
14 reports in their entirety. Should the Court determine that the lineup survey is  
15 admissible, Elements requests that it be given no more utility than that which Dr.  
16 Isaacson has admitted: limited to the two highly unlikely scenarios described  
17 above.

18  
19 DATED: October 1, 2013 MEYLAN DAVITT JAIN & AREVIAN LLP  
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